

Supreme Court, U. S.

F I L E D

IN THE

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MICHAEL R. K. JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. ~~77-676~~

EDDIE THOMPSON, JR.,

Petitioner,

v.

KENTON COUNTY BOARD OF ELECTIONS,

A. T. WOOD AND WILLIAM BAUREIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Motion to Advance Pursuant to R 43(4) of Rules of the
Supreme Court and K.R.S. 120.075(2)
Election Contest

EDDIE THOMPSON, JR., Pro Se
736 Highland Avenue
Covington, Kentucky 41011
1-606/491-6278

I hereby certify that 3 copies of the foregoing petition
have been served by the United States mail, upon: Mr.
John Elfers, 107 Park Place, Covington, Kentucky 41011;
Solicitor General, Department of Justice, Washington,
D.C. 20530, this day of November, 1977.

Eddie Thompson, Jr., Pro Se

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Fifteenth Amendment

The right of citizens of the United States to vote
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States or by any State on account of race, color, or
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. _____

EDDIE THOMPSON, JR.,

Petitioner,

v.

KENTON COUNTY BOARD OF ELECTIONS,**A. T. WOOD AND WILLIAM BAUREIS,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner, Eddie Thompson, Jr., respectfully prays that a Writ or Writs of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit to review, before judgment is issued in that court.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Kentucky was entered on June 20, 1977 (Page 2a). There was no hearing as required by due process.

JURISDICTION

The judgment of the District Court dismissing plaintiff's cause of action was entered on June 20, 1977, and a copy thereof is appended (Page 2a). The petitioner docketed an appeal on July 25, 1977. Pursuant to 28 U.S.C.A. 1653 petitioner on August 31, 1977, moved the court to amend his pleading. On September 19, 1977, the Court denied said motion.

Subsequently, petitioner moved the Court for Reconsideration of said motion on September 22, 1977. Thereafter on October 21, 1977, the Court denied said motion. The Court of Appeals has not acted on the appeal. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), providing for the granting of a Writ of Certiorari upon the petition of any party before or after rendition of judgment or decree by the Court of Appeals.

A Notice of Appeal to the Supreme Court was filed on November 2, 1977, in the Court of Appeals (Page 6a).

QUESTIONS PRESENTED

- (1) Can members of the Board of Election fix an election to deprive others the opportunity to cast their vote for a candidate, because the candidate is black.
- (2) Can members of the Board of Election fix an election to deprive a candidate of his votes because the candidate may be in sympathy with blacks.
- (3) Was plaintiff accorded due process in the District Court, when it dismissed suit without a hearing.
- (4) Did the Court of Appeals abuse its discretion by not permitting petitioner to amend his complaint to show jurisdiction.
- (5) Did the Court of Appeals abuse its discretion by not taking the case and deciding it.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State Statutes involved are K.R.S. 117.035, 117.045, 117.275, 117.285, 117.295, 117.305, 119.115, 119.135, 119.175, 119.235, 119.245, 120.055, 120.065, 120.075, and 120.085.

The Federal Statutes involved are 28 U.S.C. 1653, 42 U.S.C. 1983, 1988, as is the Fourteenth and Fifteenth Amendments to the United States Constitution.

STATEMENT

This case originated upon the filing of a complaint by Eddie Thompson, Jr., a black man, who was a candidate for City Commissioner in the City of Covington, Kentucky, in the May 24, 1977, primary election.

The May 24, 1977 Primary election was fixed, and widespread fraudulent practices persisted. The purpose of this widespread fraud was to prevent Thompson from being nominated in the May primary because he was black, and to prevent other candidates from being nominated who may have been in sympathy with blacks.

Defendants did not answer the complaint, but moved to dismiss; no authority cited.

The District Court dismissed without a hearing.

Eddie Thompson, Jr. then appealed; he moved the Court to advance the case according to State law K.R.S. 120.075 (2). The Court overruled (Page 3a).

Subsequently, Eddie Thompson, Jr. recognized that the jurisdictional allegations were not included in his complaint. He moved the Court of Appeals for leave to amend his complaint. Defendants did not object. The Court of Appeals overruled (Page 4a).

Thereafter, Eddie Thompson, Jr. moved the Court for reconsideration. Defendants did not object. The court overruled; no reason given (Page 5a).

Mr. Elfers, in his brief to the Sixth Circuit Court of Appeals, attempts to misrepresent the facts of the case to the Court of Appeals.

REASONING FOR GRANTING WRIT

The Fourteenth and Fifteenth Amendments were written into the Federal Constitution to insure to the Negro, who had recently been liberated from slavery, the equal protection of the laws and right to full participation in process of government. *Rice v. Elmore*, 165 F 2d. 387.

It is clear that where States provide for the election of officers, that right . . . is protected against dilution involving "state action" under the equal protection clause of the Fourteenth Amendment. *Fortson v. Morris*, 17 L Ed 2d 330.

The right to vote can neither be denied . . . nor diluted by ballot box stuffing. *Reynolds v. Sims*, 12 L Ed 2d 506.

Where measures resorted to by the Board of Election Commissioners involves almost total disregard of all requisites of a particular statute, irregularities cannot be dismissed as minor or technical in character. *Hale v. Goble*, 356 S.W. 2d 1.

All procedure used by a state is an integral part of the election process and must pass muster against charges of discrimination or of abridgement of the right to vote. *Moore v. Ogilivie*, 23 LEd 2d 1.

Rule 12 (b) governing presentations of defenses, provides that the defense of failure to state a claim upon which relief can be granted may be by motion, and, if on a motion asserting that defense, matter outside the pleadings that are

presented to and not excluded by the court, the motion shall be treated as one for Summary Judgment and disposed of as in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Due process implies notice of a hearing. *Orchard v. Alexander*, 157 U.S. 372.

The fundamental requirements of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard rights for which the constitutional protection is invoked. *Anderson National Bank v. Luckett*, 321 U.S. 233.

The motion to dismiss performs the same function as the old general demurrer in that it admits the well pleaded material allegations of the complaint. *Cruz v. Betts*, 31 L Ed 2d 263. *Mitchell v. Wright*, 154 F. 2d 924.

The motion should not have been granted unless it appeared beyond a doubt that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Haines v. Kernes*, 30 LEd 2d 652, *Carter v. Stanton*, 31 LEd 2d 569.

Upon the filing of the record, the Clerk of the Court of Appeals shall immediately deliver it to the Chief Justice . . . who shall call together the Judges or a majority thereof, who shall hear and determine the appeal in the same manner and with the same effect as if heard and tried by the Court in regular session. *K.R.S., 120.075(2)*.

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principal that the purpose of pleading is to facilitate a proper decision on the merits. *Forman v. Davis*, 9 LEd 2d 222, *Conley v. Gibson*, 2 LEd 2d 80.

Defective allegations of jurisdiction may be amended upon terms in the trial or appellate courts 28 U.S.C. 1653, *Rose v. Elliott*, 70 F.R.D. 422, *Clark v. Travelers Life Insurance*, 518 F 2d 1167.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served F.R.C.P. Rule 15 (a).

Failure of complaint to contain a statement of grounds upon which court's jurisdiction actually depended, was not fatal to sustaining jurisdiction on basis of federal question since under statute the missing allegation could be supplied at any time including on appeal and Court of Appeal would consider complaint to be amended to allege jurisdiction under 28 U.S.C. 1653. *Eisler v. Stritzler*, 535 F 2d 148.

Discretion of trial court with respect to amending pleading must not be abused and refusal to permit an amendment must have a justifying reason. *Anderson v. American Oil Co.*, 60 F.R.D. 676.

The grant or denial of an opportunity to amend pleading pursuant to Federal Rules of Civil Procedure Rule 15 (a) is within the discretion of the Federal District Court, but out right refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion and is merely abuse of discretion and is inconsistent with the spirit of the Federal Rules. *Forman v. Davis*, 9 LEd 2d 222.

Civil Rights suit was appropriate for application of statute which expressly allows amendments of defect to jurisdictional allegations. *Rotalo v. Borough of Chorleroi*, 532 F 2d 920.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that:

- (1) This petition for a Writ of Certiorari should be granted.
- (2) This case should be set down for argument at the earliest practicable time, if possible during the early part of January 1978.

Respectfully submitted,

EDDIE THOMPSON, JR., Pro Se

APPENDIX

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON**

CIVIL ACTION NO. 77-44

EDDIE THOMPSON, JR.,

Plaintiff,

v.

KENTON COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants.

ORDER

(Filed June 15, 1977)

The defendants having moved the Court to dismiss, it is hereby,

ORDERED AS FOLLOWS:

1. The plaintiff be and is granted a period of twenty (20) days from the date of this Order within which to respond.
2. At the expiration of twenty (20) days, the Clerk of this Court shall forward the file herein to the undersigned Judge.

This 15 day of June, 1977.

/s/ **EUGENE E. SILER, JR.,**
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

—
CIVIL ACTION NO. 77-44
—

EDDIE THOMPSON, JR.,
Plaintiff,
v.

KENTON COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants.

—
ORDER

(Filed June 20, 1977)

Upon motion made by the defendants, it is hereby

ORDERED that this matter be and is dismissed for failure to state a cause of action upon which relief may be granted. Plaintiff has alleged a number of state law violations, but he has failed to allege any federal constitutional violations which are required in bringing this case pursuant to 28 U.S.C. § 1333 (3), incorporating 42 U.S.C. §§ 1983, 1988.

This 20 day of June, 1977.

/s/ EUGENE E. SILER, JR.,
Judge

No. 77-1438

—
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,
v.

KENTON COUNTY BOARD OF ELECTIONS,
A. T. WOOD AND WILLIAM BAUREIS,
Defendants-Appellees.

—
ORDER

(Filed August 10, 1977)

Upon consideration of the plaintiff-appellant's motion to advance the cause herein for hearing, and it not appearing that any representation has been made to demonstrate why this case should have precedence,

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF
THE COURT
/s/ JOHN P. HEHMAN
Clerk

No. 77-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,
v.

KENTON COUNTY BOARD OF ELECTIONS,
A. T. WOOD AND WILLIAM BAUREIS,
Defendants-Appellees.

ORDER

(Filed September 19, 1977)

This matter is before the Court upon the motion of appellant to amend his complaint that he filed in the District Court.

It appears that the new facts alleged were never presented to the District Court for its consideration and cannot properly be made a part of the record on appeal as permitted by Rule 10 (a), Federal Rules of Appellate Procedure.

Accordingly, it is ORDERED that appellant's motion be, and it is hereby denied.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

No. 77-1438

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDDIE THOMPSON, JR.,
Plaintiff-Appellant,

KENTON COUNTY BOARD OF ELECTIONS,
A. T. WOOD AND WILLIAM BAUREIS,
Defendants-Appellees.

ORDER

(Filed October 21, 1977)

Before: WEICK, CELEBREZZE and ENGLE, Circuit Judges

This matter is before the court upon the motion of appellant requesting a reconsideration of the court's order of September 19, 1977 denying his motion to amend the complaint which had been filed in the district court.

Upon consideration of the matter it is ORDERED that the motion be, and it hereby is, denied.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

No. 77-1438

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**EDDIE THOMPSON, JR.,
Plaintiff-Appellant,**

v.

**KENTON COUNTY BOARD OF ELECTIONS,
A. T. WOOD AND WILLIAM BAUREIS,
Defendants-Appellees.**

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

(Filed November 2, 1977)

Notice is hereby given that Eddie Thompson, Jr., plaintiff above named, hereby appeals the final Order denying his Motion to Amend his pleadings, entered on the 21st day of October, 1977, and hereby declares his intention to petition for certiorari before judgment of the Sixth Circuit Court of Appeals.

This appeal is taken pursuant to 28 U.S.C. § 1254 (1).

**/s/ EDDIE THOMPSON, JR.,
PRO SE**

**736 Highland Avenue
Covington, Kentucky 41011
606/491-6278**

[CERTIFICATION OMITTED]